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Supreme Court, U.S.
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No. ——

IN THE

In the Supreme Court of the United States

WILLIAM A. CAUSEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

Counsel of Record for Petitioner

QUESTION PRESENTED

Even if the confession of a non-testifying co-defendant has been redacted to delete all references to the defendant, and the jury is instructed not to consider it against the defendant, is the Sixth Amendment violated when the prosecution uses the confession against the defendant in cross-examining him and making its case against him in closing argument?

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The petitioner, William A. Causey, respectfully requests that the Court issue a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in his case.

OPINIONS BELOW

The December 13, 2006, opinion of the United States Court of Appeals affirming Dr. Causey's conviction is published at 473 F.3d 146 and is reproduced in the appendix, App. 1. The January 22, 2007, order of the Fifth Circuit denying rehearing is unpublished and is reproduced in App. 27.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The Fifth Circuit's order denying rehearing was issued on January 22, 2007.

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

In a vigorously contested trial with conflicting evidence, Dr. William A. Causey, a distinguished physician from Jackson, Mississippi, was convicted in the United States District Court of the Western District of Louisiana of three counts of violating the Mann Act, 18 U.S.C. §§2422-2423, by transporting a minor from Jackson, Mississippi, to Shreveport, Louisiana, with the intent to engage in illegal sexual activity. (Count One alleged a conspiracy; Count Two alleged a substantive violation of 2423(a), which prohibits transportation across state lines for this purpose; and Count Three alleged a substantive violation of 2422(a), which prohibits persuading a minor to cross state lines for this purpose.) Also convicted was his co-defendant, Scott Hitt. Dr. Causey and Mr. Hitt were each sentenced to a term of 300 months imprisonment. App. 4.

All three counts arose from a single trip from Jackson to Shreveport on December 27, 2002, to watch the Independence Bowl football game, where the University of Mississippi was playing. Tr. 727. Dr. Causey, who was 62 at the time, was a University of Mississippi football fan and supporter. He and his wife had divorced several years earlier because his feelings of homosexuality became too strong, but they remained friends. Tr. 726-727. Dr. Causey and Mr. Hitt, then 37, were partners in what Dr. Causey believed was a committed relationship. Tr. 727. Dr. Causey, Mr. Hitt, and McClain Causey, one of Dr. Causey's two adult children from his marriage, went to the game. They had a fourth ticket, which Dr. Causey thought one of McClain's friends might use, but none were able to go since this was right after Christmas. Tr. 734. So they

took with them a 13 year old teenage male, AV, who Scott Hitt knew because of his long-time friendship with AV's guardians, Charlene and Jimmy Rushing. Tr. 602 - 607. With the Rushings' permission, AV occasionally would visit with Mr. Hitt and sometimes would go out to dinner with Mr. Hitt and Dr. Causey.

AV found out, apparently from Mr. Hitt, that they were going to the game and had an extra ticket. AV was a football fan and wanted to go on the trip and attend the game and the Rushings allowed him to go if he kept up his grades, which he did. Tr. 734. After the game's conclusion that night, the four spent the night in a Shreveport hotel. Tr. 740. Dr. Causey, Mr. Hitt, and AV occupied one room with two double beds. Tr. 742 - 744. Dr. Causey's son, McClain, occupied a second room with a single queen size bed. Tr. 742 - 744. Dr. Causey testified that the rooms were split up this way because Hitt said that AV, who did not know McClain very well, had asked Hitt if he could stay in the room with Hitt and Causey. Tr. 741-742. According to Dr. Causey, AV immediately jumped on one bed and fell asleep while he (Causey) and Hitt slept in the other. Tr. 747. McClain testified that the next morning, he went to the room where the others were staying, that nothing seemed amiss, and that AV was in a cheerful mood then and remained so during the return trip to Jackson that day. Tr. 391. Jimmy and Charlene Rushing both testified that they were in contact by cell phone with AV throughout the weekend, both on the day of the game and the next day, and that he was in good spirits at all times during the trip and upon his arrival back at their house in Mississippi. Tr. 609, 644.

AV had a troubled background. He walked in and found his mother shortly after she had attempted suicide by shooting herself. Sealed transcript of AV testimony, 33-36. This led to his placement in foster homes, including that of the Rushings. Charlene Rushing's brother was married to AV's mother's sister and the Rushings agreed to be his guardians. Tr. 602-605. In September 2003, nine months after the Independence Bowl game, AV was picked up by police and placed in youth court detention for a period of about two weeks. As part of his condition of release, the youth court judge prohibited him from seeing a ten year old boy in the neighborhood named Shelby Dickerson. (The record is unclear as to why this prohibition was imposed by the judge). Ms. Rushing attempted to enforce this requirement and prevent AV from visiting Shelby after AV was released from youth court detention in September 23, 2003. Tr. 614-616. She testified that AV lashed back and threatened her: "He told me that if he couldn't be friends with Shelby Dickerson, that he could make my life a living hell, that me and Scott would not be friends anymore. That he could make it happen." Tr. 615.

Soon thereafter, on October 29, 2003, AV was taken by his guardian Jimmy Rushing to an emergency room in Jackson, Mississippi, with complaints of rectal pain. Tr. 248 - 250. He was seen by Dr. Eric Zoog, M.D., who examined him, noted the formation of a possible perirectal abscess, and prescribed an antibiotic. Tr. 255-256. Dr. Zoog testified that he did not note the presence of anal fissures in the rectum, tr. 250-256, and did not see any

evidence which would have led him to believe that AV had been sexually abused. Tr. 271-272.

The next day, AV informed a teacher that two of his guardians' friends had been having sex with him over a ten month period. Tr. 236 - 237. AV later claimed that Mr. Hitt and Dr. Causey were the perpetrators and that this began when they were at the Independence Bowl in Shreveport and continued over a ten month period in which AV said he was raped by Mr. Hitt and Dr. Causey 75-90 times. Dr. Causey and Mr. Hitt were arrested and eventually tried in the Western District of Louisiana on the Mann Act charges growing out of AV's accusations about the trip to the football game.

Dr. Causey took two polygraphs, one administered by the police department that arrested him in Mississippi and another by a polygraph examiner hired by his attorneys. In both, he denied having sex with AV and the polygraph examiners concluded he was telling the truth both times. AV never took a polygraph. However, the district court denied a pretrial motion to admit the polygraph results in a one-sentence order (district court docket sheet, doc. #s 38 and 60, No. 04-50133 (W.D. La.) (available on PACER)), and the case proceeded to trial.

AV was the prosecution's first witness. Despite having delayed reporting the alleged abuse for over ten months, he testified that Mr. Hitt and Dr. Causey stayed in the same hotel room in Shreveport, and the two of them raped him there in the room. Sealed tr. AV testimony, 69-75. He said that after they returned to Jackson and he was dropped off at the Rushings' house, Causey or Hitt mentioned to the

Rushings that AV had stayed in their room. After they left, Jimmy Rushing asked AV if they had messed with him in any way, and he told Rushing they had not. *Id.* at 90-93. AV also testified that he had willingly continued to spend time with Mr. Hitt and Dr. Causey during the next ten months even though he lived at the Rushings' house. *Id.* 93-97, 99-104. He said he was raped by Mr. Hitt and Dr. Causey 75-90 times during this period. *Id.* 166. Tr. 236 - 37.

Central to the prosecution's case was an alleged unwritten and unrecorded confession by Mr. Hitt where Mr. Hitt supposedly responded to police interrogation after being arrested by saying that he had sex with AV on two occasions, once in Shreveport and once in Mississippi. Because of the purported statement, Dr. Causey's counsel filed a motion prior to trial for a severance and separate trial, but the motion was denied. District court docket sheet, doc. # 33 and docket entry for 2/28/05. Similarly, he moved to exclude the alleged confession from evidence. Doc. # 34. It was allowed into evidence, but all references to Dr. Causey were deleted when the police officer recounted the alleged confession to the jury. Tr. 407-412. This was pursuant to a pretrial ruling by the trial court. However, the trial court denied a motion by Dr. Causey's counsel to eliminate the reference to "Shreveport." Counsel had moved to exclude the reference because it would be inculpatory to Dr. Causey in light of the charges and the fact that Dr. Causey was with Mr. Hitt and AV during the only time the latter two were in Shreveport. Absent Mr. Hitt testifying, Dr. Causey's counsel would be unable to cross-examine him on this damaging statement he allegedly

made about having sex with AV at a time when they all were in the room together in Shreveport.. However, the trial judge denied the motion to exclude the reference to Shreveport. Sealed tr. of pretrial hearing, pp. 68-71.

As mentioned earlier, AV was the first witness at the jury trial. Several witnesses later, the police officer (Lieutenant Gammill) testified before the jury that Mr. Hitt stated that he had sex with AV in Shreveport and also in Mississippi. Tr. 411-412.

But Mr. Hitt himself never testified and Dr. Causey's counsel had no opportunity to cross examine him about this damaging statement he was said to have made. Dr. Causey testified and the prosecutor used Mr. Hitt's statement against Dr. Causey during the cross-examination by, among other things, highlighting the fact that they all stayed together in Shreveport and asking Dr. Causey how he could explain Mr. Hitt's confession:

Q: Now, on the trip to Shreveport, you, Scott, A.V. and McClain were pretty much together the whole time until y'all went to sleep, correct?

A: That's correct.

Q: And once y'all went in the room, you, Scott, and A.V. were together, correct, in the same room?

A: That's correct.

Q: Now, you heard Detective Gammill say that Scott confessed that he did have sex with A.V. in Shreveport. You heard that, correct?

A: I heard that.

Q: Now, before this case, you haven't met Detective Gammill. Would that be fair to say?

A: Before this case?

Q: Before this case.

A: No.

Q: You haven't met him, you haven't seen him anywhere before?

A: Before this case?

Q: Before this case.

A: No.

Q: *And you, Scott, and A.V. room together. Scott said he had sex with A.V. in Shreveport. How do you explain what Scott said?*

A: Scott denies to me that he ever said that.

Q: So you are saying that Detective Gammill lied?

A: No. I am telling you what Scott told me. That's all I know.

Q: But he hasn't met you before?

A: Who hasn't?

Q: Gammill.

A: No.

Q: And to the best of your knowledge, Gammill hasn't met Scott Hitt before?

A: Not to my knowledge.

Q: So Gammill is just making this up?

A: (no verbal response)

Q: I am asking you: Is he just making it up?

A: Was that a question?

Q: Yes, it's a question. Is he just making it up?

A: I don't know.

Tr. 807-808 (emphasis added).

Conflicting evidence was presented throughout the case and the allegations were vigorously disputed. Dr. Causey testified that he never had any kind of sexual contact with AV. Tr. 752, 758-759. AV testified that it happened, not only in Shreveport, but frequently during the subsequent ten months, even though he did not report it to anyone during that time. Both Charlene and Jimmy Rushing testified that AV, who was removed from their home after these allegations, later called them and said he had made a big mistake. Tr. 616. Jimmy Rushing also said AV had told him Scott initiated it and Dr. Causey had nothing to do with it. Tr. 644-645. They each said that AV frequently lied and could not be trusted, that he had a reputation of dishonesty, and that they would not believe him under oath. Tr. 608, 613, 617-618, 640, 645. Charlene said AV had not only lied to her and threatened to make her life a living hell by ruining her friendship with Mr. Hitt, but had screamed and hollered at her, thrown things at her, and threatened to beat her up. Tr. 609-610, 614-616.

By contrast, witnesses who worked with Dr. Causey said that he was a talented and dedicated physician of longstanding with an exemplary professional and personal reputation who was honest, who told the truth, and would not do something like this. Tr. 706-712, 817-818. A Jackson native, he had served on the faculty at the University of Chicago Medical School and then returned to Mississippi and served as Chief of Medical Services at the VA hospital in Jackson and also associate professor of medicine at the University of Mississippi School of Medicine. He later left those positions for private practice, and also was consultant in infectious diseases and infection control at the Mississippi Baptist Medical Center and spent a day a week working at and serving as medical director to the Hospice Ministries Inpatient Unit in Jackson. He remained in Jackson despite offers of prestigious opportunities elsewhere. Tr. 716-724. No witnesses testified that AV was an honest person and, as mentioned earlier, his guardians testified that he could not be believed. Moreover, evidence was presented that AV knew he would be the beneficiary of a lawsuit filed on his behalf against Causey and Hitt by his guardian *ad litem* for many millions of dollars. Tr. 211.

Other evidence contradicted AV's claims. AV testified that some of these alleged rapes during the ten month period occurred at lunchtime at Dr. Causey's house. Tr. 101. Dr. Causey's assistant, however, testified that he never went home for lunch because he was always at lunch at his desk or in the hospital near his office before his hospital rounds. Tr. 705-708.

Indeed, there was a conflict between the purported confession of Hitt as recounted by Lieutenant Gammill, who said Hitt said he had both anal and oral sex with AV on two occasions, one in Shreveport and one in Mississippi, tr. 410, while AV himself testified and told others that no oral sex took place, only anal sex, tr. 336, sealed tr. of AV testimony 169, thus calling into question both AV's story and Lieutenant Gammill's claim that Hitt gave this confession.

Also, there was a conflict in the medical testimony. No DNA or physical evidence linked Dr. Causey or Mr. Hitt to this. As mentioned earlier, Dr. Zoog, the emergency room doctor, testified that he saw no anal fissures or indications of sexual abuse during his examination of AV the day before AV claimed to have endured 75-90 rapes over a ten month period. Tr. 250-256, 271-272. He also testified that photographs of AV's anus taken two weeks later showed no fissures, tr. 686-692, even though the prosecution's medical expert testified to the contrary. Tr. 318-319.

In the midst of these conflicts and questions, Hitt's purported confession took on added significance, as was clear not only from the prosecutor's cross-examination of Dr. Causey, but from the prosecution's closing argument. Although the trial court instructed the jury as part of the jury instructions that Hitt's alleged statement should not be considered against Dr. Causey, tr. 978-979, the prosecution used the Shreveport reference in closing argument in a way that was very damaging to Dr. Causey. In referring to the police officer who testified about Mr. Hitt's alleged confession, the prosecutor said:

> When they came to Shreveport, he was firm, he said that Scott Hitt told him he had sex with A.V. in Shreveport. He was firm about that. No equivocation at all. *And they're all together. They slept together in the same room. And Scott Hitt said: Yeah, I had sex with A.V. in Shreveport.* That's powerful. That's very powerful.

Tr. 917 (emphasis added). The prosecutor followed up, at the end of his rebuttal closing, by accusing both Mr. Hitt and Dr. Causey of this crime and then, in his last words to the jury, referring again to Mr. Hitt's purported confession with respect to both of them:

> And if you dig deep down, you know *that man and that man right there* brutalized that boy. You know why *they* brought him over here. McClain thought it was odd to see A.V. go to the room with two men. A.V. looked back and saw McClain confused. That is all you need. *And if you need something else, Scott Hitt confessed. He said that it happened. He confessed.* Thank you very much.

Tr. 971 (emphasis added).

The jury retired. After lengthy deliberations, the members of the jury — reflecting the conflicting nature of the evidence — reported they were deadlocked. Tr. 1002. The trial judge gave an *Allen* charge, tr. 1004-1009, and sent the jury back for further deliberations. Some time thereafter, the jury returned and found Dr. Causey and Mr. Hitt guilty. Tr. 1014-1015. They each were sentenced to 300 months in prison.

The Court of Appeals affirmed. App. 1. In so doing, the Fifth Circuit rejected the claim that the use of Scott Hitt's confession violated Dr. Causey's Sixth Amendment rights, and specifically said that the prosecutor's use of the confession in cross-examining Dr. Causey and in closing argument was permissible since all references to Causey had been removed from the confession. App. 21-22. Although there had been no objection by the defense during the cross-examination or closing to the prosecutor's use of the Hitt confession, the government did not mention or rely on that in its brief and the Fifth Circuit did not mention or rely on it in its opinion. Instead, the Fifth Circuit resolved the issue on the merits.

Dr. Causey filed a petition for rehearing, which was denied. App. 27. Mr. Hitt did not file a petition for rehearing, but filed a petition for certiorari, which has been denied. No. 90-10132 (den. 4/16/07). Dr. Causey now files his own petition, which raises a different issue from that raised by Mr. Hitt.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION CONFLICTS WITH THE STATEMENT OF THIS COURT IN *RICHARDSON v. MARSH*, AS WELL AS A HOLDING OF THE FIRST CIRCUIT, THAT IT IS ERROR FOR A PROSECUTOR TO USE CLOSING ARGUMENT TO LINK THE REDACTED CONFESSION OF A NON-TESTIFYING CO-DEFENDANT TO THE PURPORTED GUILT OF THE DEFENDANT.

In *Richardson v. Marsh*, 481 U.S. 200 (1987), this Court held that the Sixth Amendment is not violated when a non-testifying co-defendant's confession is redacted to exclude any reference to the defendant and the jury is instructed not to consider the confession against the defendant. However, the Court specifically said there was "error" when, in closing argument, "the prosecutor sought to undo the effect of the limiting instruction by urging the jury to use [the co-defendant] Williams' confession in evaluating respondent's case." *Id.* at 211. Even though no objection had been lodged during the closing argument, the Court remanded the case to the Sixth Circuit to determine whether "the error can serve as the basis for granting a writ of habeas corpus." *Id.* (It appears the Sixth Circuit's decision on remand was not published).

In *Richardson*, the co-defendant confessed that he and an accomplice had a conversation in a car on the way to a robbery in which the accomplice said they were going to have to kill the victims after the robbery. It was redacted to exclude all references to the defendant. The co-

defendant never testified. But the defendant testified, saying that she was in the back seat of the car on the ride, but could not hear the conversation in the front seat because the radio was on. She said she had no knowledge that a robbery was going to take place. The Court said that in closing argument, the prosecutor "linked [the defendant] to the portion of [the co-defendant's] confession describing his conversation with [the accomplice] in the car." *Id.* at 205. The Court quoted the prosecutor's argument where he asked the jury if the defendant's claim that she could not hear the conversation was "reasonable." *Id.* at 205 n. 2.

The Court in *Richardson* held that, unlike in *Bruton v. United States*, 391 U.S. 123 (1968), where the confession was not redacted, there was no Sixth Amendment violation when the redacted co-defendant's confession was introduced and the jury was instructed not to consider it against the defendant. This was so, according to the *Richardson* majority, because "the confession was not incriminating [against the defendant] on its face, and became so only when linked to evidence introduced later at trial (the defendant's own testimony)." 481 U.S. at 208. "Where the necessity of such linkage is involved," said the majority, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." While that generalization led the Court in *Bruton* to hold that jurors would find it difficult to ignore an unredacted confession from a co-defendant in considering the defendant's guilt, the Court in *Richardson* said the instruction would be sufficient to avoid the problem if the confession was redacted.

But the Court in *Richardson* went on to say, at the end of its opinion, that the prosecutor committed "error" in closing argument when he "linked" the defendant to the confession, *id.* at 205, and "sought to undo the effect of the limiting instruction by urging the jury to use Williams' confession in evaluating respondent's case." *Id.* at 211. While there was no objection to the prosecutor's closing argument, the Court nevertheless remanded the case to the Sixth Circuit to determine whether the conviction should be vacated and the writ of habeas corpus issued despite the failure to object.

In the present case, the prosecutor similarly linked Dr. Causey to co-defendant Hitt's redacted confession and urged the jury to use that confession in evaluating Dr. Causey's case. In cross-examining Dr. Causey, the prosecutor said: "And you, Scott, and A.V. room together. Scott said he had sex with A.V. in Shreveport. How do you explain what Scott said?" Tr. 807-808. In closing argument, he said: "And they're all together. They slept together in the same room. And Scott Hitt said: Yeah, I had sex with A.V. in Shreveport. That's powerful. That's very powerful." Tr. 917. And in his final words to the jury, he was arguing how "they" brought AV to Louisiana for an illegal purpose and was referring to evidence he believed bolstered that contention, and then said, "That is all you need. And if you need something else, Scott Hitt confessed. He said that it happened." Tr. 971.

The Fifth Circuit held that there was no Sixth Amendment violation in the introduction or use of Hitt's confession. The Court held that the issue had been preserved by Dr. Causey's *in limine* motion. App. 21. And

the Court specifically rejected Dr. Causey's argument on appeal that the prosecutor's use of the Hitt confession during the cross-examination of Dr. Causey and the closing argument was error. The Fifth Circuit said: "The Sixth Amendment is not violated in these circumstances because Hitt's statement as elicited from [Lieutenant] Gammill on direct, and as used in cross-examination and closing, did not include *any* references to Causey, and Causey had an opportunity to cross-examine Gammill." App. 22 (emphasis in original).

While there was no objection at the time the prosecutor used the confession in cross-examining Dr. Causey and used it against Dr. Causey in closing, the government did not mention this failure to object or rely on it in its appeal brief. The government actually claimed something else — that there was a failure to object contemporaneously to the police officer's direct testimony about Hitt's confession. Govt. brief at 27-30. But the Fifth Circuit correctly pointed out that the Sixth Amendment issue regarding the confession had been raised and properly preserved pretrial. App. 21. With respect to the failure to object to the use of the confession in the prosecution's cross-examination or closing, the government did not raise it and the Fifth Circuit did not mention that failure or rely on the plain error doctrine when rejecting Dr. Causey's appeal on that issue. Instead, the Fifth Circuit reviewed that claim on the merits and held there was no error at all in cross-examination or closing. App. 22. Thus, there is no barrier to review in this Court. *See, Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 378-379 n. 1 (1970) (reaching the merits of a federal question and stating, "[s]ince the

Court of Appeals, without objection, treated the merits of the petitioner's [claim], we need not consider whether she might otherwise be precluded from pressing that attack because of her default in failing to urge the same theory in the trial courts."); *Jones v. United States*, 362 U.S. 257, 272 (1960) (reviewing the merits of claim that was not preserved in the district court, but nevertheless was fully considered and rejected on the merits in the court of appeals).

Having reached the merits, the Fifth Circuit held there was no error in using the confession in cross-examination or closing inasmuch as the references to Dr. Causey had been excluded. App. 22. But this Court in *Richardson* assumed that the use by the prosecutor of a co-defendant's confession against a defendant in closing is "error" even if the confession is redacted to exclude all reference to the defendant. As the Court indicated, this had the effect of undoing the limiting instruction. This increased the risk that the jury would consider the co-defendant's statement against the defendant even though the co-defendant could not be cross-examined. Indeed, the Court's remand for further review of this issue in *Richardson*, where there had been no objection to the prosecutor's action, left open the possibility that this is plain error.

The Fifth Circuit's holding here — that the prosecution could link the confession with other evidence and use it against Dr. Causey in cross-examination and closing simply because the references to him had been deleted — is directly at odds with the brief discussion of the issue in *Richardson*. It also conflicts with the First Circuit's decision and reasoning in *United States v. Vega Molina*,

407 F.3d 511, 522 (1st Cir. 2005), which cites *Richardson* on this point. At the same time, the Court in *Richardson* did not discuss this issue in any detail. Instead, it simply assumed this was error in a short paragraph at the end of the opinion. This is an issue that deserves further review. Because of the prosecutor's egregious misuse of the redacted confession in the circumstances of the present case, particularly the contradictory nature of the evidence as reflected in the jury's initial deadlock after lengthy deliberations, certiorari should be granted to determine if the Sixth Amendment right of confrontation was violated.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

Counsel of Record for Petitioner

473 F.3d 146

United States Court of Appeals, Fifth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Scott H. HITT; William A. Causey, Defendants-Appellants.
No. 05-30835.

Dec. 13, 2006.

Josette Louise Cassiere, Asst. U.S. Atty. (argued), Ross Stewart Owen, Earl M. Campbell, Shreveport, LA, for Plaintiff-Appellee.

Betty Lee Marak (argued), Shreveport, LA, for Scott H. Hitt.

Brian E. Steel (argued), Atlanta, GA, Kenneth Craig Smith, Jr., Smith & John, Shreveport, LA, for William A. Causey.

Appeals from the United States District Court for the Western District of Louisiana.

Before HIGGINBOTHAM, DENNIS and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Scott Hitt and **William Causey** appeal their convictions for violating the Mann Act, 18 U.S.C. § 2422-23, raising various points of error. For the following reasons, we affirm both Hitt's conviction and Causey's conviction.

I. FACTS AND PROCEEDINGS

Scott Hitt and **William Causey** were indicted on three counts of violating the Mann Act, which criminalizes transporting a minor child across state lines for the

purpose of engaging in illicit sexual activity.[1] At trial, evidence was introduced that Hitt and Causey, who were together in a homosexual relationship for a number of years, befriended the minor victim, whose initials are AV. Hitt and Causey were introduced to AV by one of his guardians at the time, Charlene Rushing. AV testified that, after the introduction in October 2002, Hitt and Causey took AV to dinner, ice skating, to the movies, and shopping, among other things. AV testified that, at one point during these encounters, Hitt "touched" AV's buttocks. Later in autumn, Hitt and Causey invited AV to attend the Independence Bowl football game in Shreveport, Louisiana. Hitt, Causey, AV, and Causey's son, McClain, traveled to Shreveport from the Jackson, Mississippi, area. The group attended the football game, had dinner afterward, and then retired to their hotel rooms. AV recalled that there was a mix-up at the hotel at which the group intended to sleep and that, accordingly, the group traveled to another hotel which had rooms available. Prior to arrival in Shreveport, the group had discussed sleeping arrangements, specifically that McClain and AV were to have shared a room while Hitt and Causey were to have shared a separate room. But upon arrival at the second hotel and at the request of either Hitt or Causey, AV shared a room with Hitt and Causey while McClain slept alone in a separate room.

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[1] Count One alleged a violation of 18 U.S.C. § 2423(b) and (e) (conspiracy to violate other provisions of the Mann Act); Count Two alleged a violation of § 2423(a) (transporting a thirteen-year-old across state lines to engage in illicit sexual activity); and Count Three alleged a violation of § 2422(a) (knowingly persuading, inducing, enticing, and/or coercing a thirteen-year-old to travel across state lines to engage in illicit sexual activity).

AV testified that Hitt and Causey assaulted him that night: Causey held him down while Hitt had anal intercourse with him. AV did not tell anyone about what happened until much later. AV also testified that Hitt and Causey continued to have anal intercourse with him, approximately seventy-five to ninety times, through the fall of 2003.

AV testified that the last time Hitt and Causey had anal intercourse with him was in October 2003 and that, afterward, because AV complained of pain in his anal area, one of his guardians took him to a hospital.[2] The examining doctor, Dr. Zoog, diagnosed a rectal abscess. The next day AV told his teacher about the sexual abuse. From that point, AV underwent a physical examination conducted by Dr. Persing and was interviewed by numerous individuals from state social services. At trial, Dr. Persing showed photographs to the jury and testified that the photographs depicted AV's anal area, which showed characteristics of sexual abuse, such as fissures, redness, and bleeding.

The government introduced testimony by Detective Gammill, who was present at the arrest of both Hitt and Causey. Gammill stated that Hitt confessed to having anal intercourse with AV in Shreveport and in Mississippi. The government also introduced testimony from an expert in the behavior of sexual abusers and their abused, Dr. Seiden, who explained certain behaviors exhibited by Hitt, Causey, and AV. The government presented testimony from another of Hitt's alleged adolescent sexual-abuse

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[2] Causey was employed as a physician at the hospital to which AV was taken. Causey did not, however, examine AV.

victims, David Moore, as to details of abuse that were similar to the details of the abuse described by AV.

Hitt and Causey's defense consisted of attempting to prove that AV was not credible. To that end, Causey took the stand in his own defense, and the defendants cross-examined AV. The defense also called co-workers of Causey to provide testimony that Causey had been working at times when the alleged abuse of AV in Mississippi had occurred, character witnesses, a child psychology expert, and Charlene Rushing. Ultimately, the jury returned a verdict of guilty for both defendants on all counts, and the judge sentenced them both to 300 months, followed by supervised release.

Though the defendants appeal separately, they each bring four challenges that involve nearly identical arguments: (1) that the evidence was insufficient to convict Hitt and Causey of the Mann Act violations; (2) that the district court committed reversible error when it charged the jury with a superceded *Allen* charge; (3) that the district court violated the defendants' right to a public trial by closing the courtroom for the hearing of a pre-trial motion and for AV's testimony at trial; and (4) that the district court's limitation of cross-examination of AV violated the Confrontation Clause. Additionally, Hitt challenges his conviction on two separate grounds: (1) that the district court abused its discretion, under *Daubert,* when it allowed a psychiatrist to testify about the behavior of adolescent victims of sexual abuse and about the behavior of sexual abusers of children; and (2) that the district court erred by allowing, under Federal Rule of Evidence 413, a separate alleged victim of Hitt's sexual abuse, David Moore, to testify. Causey challenges his conviction on three separate grounds: (1) that the district court violated the

Confrontation Clause by allowing the use of Hitt's confession, which did not mention Causey, in cross-examination of Causey and other witnesses; (2) that the district court committed reversible error by prohibiting Causey from questioning one of Hitt's witnesses on re-direct when Causey did not undertake a direct examination of the witness; and (3) that unobjected-to remarks in the government's closing statement were plain error that required reversal of the jury's verdict.

II. DISCUSSION

A. Sufficiency of the evidence

So long as a rational jury could have found the elements of each offense proven beyond a reasonable doubt, this court must uphold the verdict. *United States v. Gonzales,* 436 F.3d 560, 571 (5th Cir.2006). To prove a Mann Act violation, the government must prove that engaging in illicit sexual activity was "one of the efficient and compelling purposes of the travel." *United States v. Garcia-Lopez,* 234 F.3d 217, 220 (5th Cir.2000) (internal quotation omitted); *see also Mortensen v. United States,* 322 U.S. 369, 374, 64 S.Ct. 1037, 88 L.Ed. 1331 (1944) (requiring illicit sexual activity to be a "dominant motive" of the travel). Hitt and Causey contend that the government's case regarding intent is based entirely upon circumstantial evidence. Both argue that, instead of any illicit purpose, the trip's purpose was to attend the Independence Bowl football game and that, assuming sexual activity did occur, it was spontaneous.

The government presented sufficient circumstantial evidence from which a jury could rationally conclude that Hitt and Causey had the illicit intent necessary to support

the Mann Act convictions. The government presented expert testimony by Dr. Seiden that persons who sexually abuse children engage in a "grooming process" designed to reduce resistance to sexual advances. This process, according to testimony, includes gift-giving, isolating the victim from his guardians, and activity designed to desensitize the victim to sexual advances, *e.g.*, touching in an innocuous manner and thereafter escalating the sexual nature of the touches. Evidence was presented regarding Hitt and Causey's "grooming" of AV prior to the Independence Bowl trip: (1) that Hitt and Causey had purchased gifts for the victim, including dinners and a sweater, and (2) that Hitt had "touched" AV's buttocks. It is clear that AV was not accompanied on the Independence Bowl trip by his guardians, thus indicating that AV was isolated, at least physically, from his guardians. Evidence was also presented from which the jury could infer that Hitt and Causey manipulated the sleeping arrangements at the Shreveport hotel to ensure AV would room with Hitt and Causey.[3] Testimony elicited from the victim indicated that abuse occurred in the Shreveport hotel, and medical testimony regarding injuries to AV's rectal area was consistent with sexual abuse and consistent with AV's statements that the sexual abuse continued in Mississippi after the group had returned.[4] The

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[3] The relevant evidence was that, when the group approached the hotel in Shreveport, Hitt or Causey told AV that AV would be sleeping in a room with Hitt and Causey, rather than with McClain, as had been planned.

[4] Also supporting the verdict is evidence of the *modus operandi* employed by Hitt and Causey in both the AV and David Moore abuse situations. AV testified that Hitt and Causey engaged in certain activities that a defense expert testified were consistent with the grooming process. Moore testified that Hitt and Causey engaged in similar behavior. Additionally, Moore's testimony regarding Hitt and

(Continued on following page)

jury could reasonably infer that Hitt and Causey transported the victim to Louisiana with an "efficient and compelling" purpose to engage in illicit sexual activity. *See Garcia-Lopez,* 234 F.3d at 220; *see also Masse v. United States,* 210 F.2d 418, 421 (5th Cir.1954).

B. The district court's Allen charge

District courts have broad discretion to give *Allen* charges when the jury indicates deadlock. *United States v. Rivas,* 99 F.3d 170, 175 (5th Cir.1996). Where a defendant does not object to the use of an *Allen* charge, review is for plain error. *United States v. Miles,* 360 F.3d 472, 482 (5th Cir.2004). Courts may "give modified versions of the *Allen* charge, so long as the circumstances under which the district court gives the instruction are not coercive, and the content of the charge is not prejudicial." *United States v. McClatchy,* 249 F.3d 348, 359 (5th Cir.2001) (internal quotation omitted). "[T]he conviction will not be reversed unless an error seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceeding." *Id.* (internal quotation omitted) (alteration in original).

Here, the district court, without objection by the defendants,[5] charged the jury from a superceded version of

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Causey's sexual abuse of Moore was that one defendant pinned Moore down while the other defendant engaged in sexual acts. AV's testimony indicated that Hitt and Causey's abuse of AV occurred in the same manner.

[5] Defendants' counsel objected to the reading of an *Allen* charge *in toto* before its language was reviewed, but neither counsel objected to the charge's language. The following exchange occurred:

> The Court: "If you have an objection to [the modified *Allen* charge], put it on the record."
>
> Mr. Mayfield [Hitt's counsel]: "Not to the language of it."

the Fifth Circuit Pattern Jury Instructions: Criminal. The difference in language between the superceded version and the then-current version was in the fourth paragraph. The fourth paragraph heard by the jury was:

> If a substantial majority of your number are for a conviction, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one, since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are for acquittal, the other jurors ought to seriously ask each themselves [sic] again, and most thoughtfully, whether they do not have a reason to doubt the correctness of the judgment which is not shared by several of their fellow jurors, and whether they should distrust the weight and sufficiency of evidence which fails to convince several of their fellow jurors beyond a reasonable doubt.

By contrast, the fourth paragraph of the then-current pattern instruction states:

> Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt.

Fifth Cir. Pattern Jury Instructions: Criminal 1.45 (2001).

Whatever the reason the district court used the language of a superceded pattern jury instruction, the mere fact that it did so does not require reversal because the district court may give a modified version of the *Allen* charge. *See McClatchy,* 249 F.3d at 359. Indeed, the superceded instructions were in effect from 1997 through 2001 without any case holding that the language of the fourth paragraph was prejudicial. Nonetheless, this court must review the content of the charge to determine if it is prejudicial and the circumstances surrounding the charge's use to determine if the jury was coerced. *Id.* Both defendants focus their argument on the substance of the issued *Allen* charge, implicitly arguing prejudice. They argue that the charge did not refer to holdouts for acquittal in an even-handed way and that the charge required several holdouts – rather than one – for those in favor of conviction to question their position.

The defendants' arguments fail because the remaining content of the charge admonished that "no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence" and that "if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of not guilty." An individual juror's opinion as to guilt or innocence was protected, and the charge as given did not prejudice the jurors. *Cf. United States v. Clayton,* 172 F.3d 347, 352 (5th Cir.1999) (holding that an *Allen* charge omitting the reasonable doubt standard was not prejudicial where a previously issued charge protected the jury's understanding of reasonable doubt). There was no reversible error, plain or otherwise.

C. Courtroom closure

A trial can be closed and not violate the Sixth Amendment's command in limited circumstances. *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 509-10, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (quoting *Press-Enterprise,* 464 U.S. at 510, 104 S.Ct. 819). The district court also must consider reasonable alternatives to closure. *Id.* at 48, 104 S.Ct. 2210. The Sixth Amendment's protection extends to pretrial hearings. *Id.* at 47, 104 S.Ct. 2210.

The district court closed the courtroom during a pretrial suppression hearing. Neither Hitt nor Causey objected to this closing. At this hearing, the parties discussed evidentiary motions and Detective Gammill gave testimony relevant to Causey's motion *in limine* to exclude Hitt's alleged confession, which Causey argued unconstitutionally inculpated him. After this hearing, the government filed a motion to close the courtroom for AV's testimony at trial. Neither defendant opposed this motion. The district court did not hold a hearing but instead entered an order that included a finding that "the victim 'A.' is a minor and that closure would protect his interests

and well-being."[6] Attached to this order, which suggests that the district court implicitly adopted it, was the government's motion to close the courtroom, which included information regarding AV's psychological state, including an affidavit in which AV's guardian at the time averred that AV was "having difficulty sleeping," was "having nightmares," and was "showing significant signs of post-traumatic stress syndrome," according to AV's counselor.[7]

Both defendants, however, now claim that their right to a public trial was violated both at the suppression hearing and during AV's testimony at trial. The defendants argue that *Waller,* 467 U.S. at 45, 104 S.Ct. 2210, applies and that the prerequisites to courtroom closure contained therein were not satisfied by the district court. They contend that this error was "structural," in that it affected the fundamental fairness of the trial, *see Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (categorizing the denial of a public trial as a "structural" error), and that, accordingly, their convictions should be

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[6] AV was sixteen years old during trial. The Shreveport trip occurred over two years before.

[7] We note that this order meets the *Press-Enterprise* closure requirements. There is a compelling interest in protecting the privacy and psychological well-being of AV. *See Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). The closure was also limited to AV's testimony, and there have been no reasonable alternatives suggested. The order, with its implicit adoption of the government's motion, contained findings sufficient to justify the closure. *See United States v. Osborne,* 68 F.3d 94, 99 (5th Cir.1995) (holding that a limited closure that excluded only certain persons did not violate the Sixth Amendment even though "the district court did not create a detailed record"); *see also Bell v. Jarvis,* 236 F.3d 149, 172-75 (4th Cir.2000) (noting that findings were "obvious" from the record).

reversed. The defendants' argument, however, overlooks the fact that, regardless of whether the *Waller* prerequisites are met, defendants can waive their right to a public trial. That is what happened here.

Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial.[8] *See Levine v. United States,* 362 U.S. 610, 618-19, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960); *see also Singer v. United States,* 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965) (noting that a defendant can waive the right to a public trial); *Lacaze v. United States,* 391 F.2d 516, 520-21 (5th Cir.1968) (holding that the court's order that the courtroom be locked during one session of the trial was not reversible error when the defendant did not object to the closure). A defendant's attorney's waiver of the right to a public trial is effective on the defendant. *United States v. Sorrentino,* 175 F.2d 721, 723 (3d Cir.1949); *see also Martineau v. Perrin,* 601 F.2d 1196, 1200-01 (1st Cir.1979).

Even before the suppression hearing, Hitt and Causey (and their respective attorneys) had notice, through various pleadings and motions previously filed, that the allegations involved sexual abuse of a minor child and that the government was seeking to place under seal the alleged victim's name as well as other medical evidence.

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[8] This principle is not inconsistent with *Waller,* which, unlike the situation here, involved courtroom closure for a suppression hearing *over the defendant's objection.* 467 U.S. at 40-41, 104 S.Ct. 2210. Only if there was no waiver can the courtroom closure violate the Sixth Amendment. *See Levine v. United States,* 362 U.S. 610, 618-19, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960) (holding that a defendant's attorney's failure to request that a courtroom previously closed for grand jury proceedings be re-opened waived the defendant's right to a public trial).

Hitt and Causey and their respective attorneys were, of course, present during both the suppression hearing and the closure of the trial for AV's testimony. At no time during the suppression hearing, after the government filed its motion to close the trial during AV's testimony, during the time between the suppression hearing and trial, at trial, or even in post-trial motions, did Hitt or Causey object to the courtroom closure. The defendants therefore waived their Sixth Amendment right to a public trial. *See Levine,* 362 U.S. at 618-19, 80 S.Ct. 1038.

D. Cross-examination of the victim

A district court's limitation of cross-examination of a witness is reviewed for abuse of discretion. *United States v. Davis,* 393 F.3d 540, 548 (5th Cir.2004). Abuse-of-discretion review is only invoked if the limitation did not curtail the defendant's Sixth Amendment right to confront witnesses. *See id.* Whether a defendant's Sixth Amendment rights were violated is reviewed de novo. *Wilkerson v. Cain,* 233 F.3d 886, 890 (5th Cir.2000).

Both Hitt and Causey argue that the district court unconstitutionally limited the scope of their cross-examinations of AV. They argue that they should have been allowed to cross-examine AV about a prior instance of sexual abuse that had been perpetrated on AV by Chris Reynolds. Before trial, Hitt and Causey moved to admit evidence of the Reynolds abuse under Federal Rule of Evidence 412.[9] The defendants sought to introduce the

[9] Rule 412 states that evidence of the victim's prior sex acts is "generally inadmissible" unless, *inter alia,* the exclusion would violate the defendant's constitutional rights.

evidence for two purposes: (1) to impeach AV's credibility by pointing out inconsistencies in AV's statements regarding the type of sexual abuse that Hitt and Causey perpetrated[10] and (2) to impeach AV's credibility by challenging AV's statement that he did not come forward sooner because he feared reporting the abuse.[11] The district court excluded the Reynolds abuse evidence under Rule 412 and disallowed any reference to it during the trial, including the cross-examination of AV.

A defendant is entitled to "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (internal quotation omitted). "The Confrontation Clause . . . is satisfied where defense counsel has been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and

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[10] Only Hitt raises this argument on appeal. Hitt argued below that AV made a statement that Hitt and Causey did to AV the same thing that Reynolds did. Hitt sought to offer evidence at trial, in the form of testimony by Reynolds, that Reynolds was indicted for oral copulation and pleaded guilty to sexual battery, but *did not* have anal intercourse with AV. Hitt sought to cross-examine AV on this topic. Hitt now argues that, because AV later testified that Hitt and Causey had anal intercourse with him and because this testimony is inconsistent with his prior statement regarding the similarity in conduct between the Reynolds abuse and the abuse by Hitt and Causey, he should have been allowed to question AV about the Reynolds abuse for impeachment purposes.

[11] Both defendants raise this argument. Before trial, the defendants sought to introduce evidence that AV previously had been sexually abused and that AV knew how to report such behavior to authorities because he had done so before. According to the defendants, the evidence of prior sexual abuse and the reporting of it would have dispelled any notion that AV was naive about such things and indicated that AV's allegations were untruthful.

credibility, could appropriately draw inferences relating to the reliability of the witness." *United States v. Restivo,* 8 F.3d 274, 278 (5th Cir.1993) (internal quotation omitted). A defendant's right to cross-examine a witness, however, is not unlimited. Trial courts retain wide discretion "to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Michigan v. Lucas,* 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991) (quoting *Van Arsdall,* 475 U.S. at 679, 106 S.Ct. 1431).

The government essentially argues that the district court was correct in concluding that the evidence of AV's prior sexual acts is only marginally relevant and that introduction of such evidence would be prejudicial and cause jury confusion. We agree. The government points out that the district court concluded that Hitt and Causey's contention that AV reported the instance of sexual abuse with Reynolds was factually inaccurate because AV affirmatively reported the incident only after he was approached by investigators who were responding to complaints from other alleged victims of sexual abuse by Reynolds. Hitt sought to impeach AV's credibility by introducing prejudicial sex act evidence that is only marginally relevant to AV's credibility. That AV was previously sexually abused by Reynolds and discussed it with authorities *only after* being approached by authorities about the matter has little bearing on whether AV was truthful in his allegations that Hitt and Causey sexually abused him. Similarly, that Reynolds was willing to testify that he only engaged in oral sex with AV is only marginally relevant to whether AV was truthful in his sexual

abuse allegations respecting Hitt and Causey. Moreover, allowing this line of questioning would have led to introduction of testimony, through re-direct of AV and, perhaps, through cross-examination of Reynolds, that Reynolds abused AV not just orally but also anally. The district court's decision to disallow the Reynolds abuse evidence and to limit the cross-examination of AV on the topic avoided the confusion and prejudice that would have inevitably resulted from examining the facts surrounding the Reynolds sexual abuse. *See United States v. Tail,* 459 F.3d 854, 861 (8th Cir.2006) ("Admission of [prior sexual abuse allegations] would have triggered mini-trials concerning allegations unrelated to [the present] case, . . . increas[ing] the danger of jury confusion and speculation.").

Other circuits have held that evidence of prior sex acts of alleged victims of a sexual assault can be excluded without violating the Sixth Amendment when defendants seek to introduce such evidence to impeach the victim or to otherwise diminish the victim's credibility. *See United States v. Powell,* 226 F.3d 1181, 1199 (10th Cir.2000) (rejecting a defendant's constitutional challenge to a district court's exclusion of evidence the purpose of which was to rebut inferences that the victim was "naive," "innocent," or "unsophisticated"); *United States v. White Buffalo,* 84 F.3d 1052, 1053-54 (8th Cir.1996) (holding that a defendant's Confrontation Clause rights were not violated when the district court excluded testimony and evidence that might "impeach the victim's truthfulness and . . . show her capability to fabricate a story about the rape"). We hold that the district court did not violate the Confrontation Clause by limiting the cross-examination of AV.

This holding is supported by a recent Fifth Circuit decision in *United States v. Jimenez,* 464 F.3d 555 (5th Cir.2006). There, this court held that the Confrontation Clause was violated when the district court prohibited the defendant from questioning the "only witness" as to Jimenez's alleged drug sales by disallowing a line of questions that was "the only way to test the reliability of [the witness's] testimony." *Id.* at 561. Here, Hitt and Causey were permitted to cross-examine AV, thereby impeaching AV's credibility. During that cross-examination, counsel asked AV about past events and certain inconsistencies between AV's testimony and his prior statements. For instance, Causey's counsel asked AV about being arrested for running away from home, about an inconsistency between a prior statement by AV and his testimony regarding Hitt and Causey's attempt to have AV sleep in their room at the Shreveport hotel, about an inconsistency between AV's prior statement to a social worker regarding the duration of the abuse and AV's testimony at trial regarding the same, and about various other alleged inconsistencies between statements AV made to investigators about Hitt and Causey's abuse of him and other evidence introduced at trial. Causey's counsel also questioned AV about what the defendants characterized as a motive for AV to lie about Hitt and Causey's abuse, *i.e.,* that AV's guardian, Charlene Rushing, prohibited AV from seeing one of AV's friends, which allegedly caused AV to seek revenge by falsely accusing Hitt, who was one of Rushing's close friends, of sexual abuse. Moreover, unlike in *Jimenez,* while AV was certainly an important witness for the government, he was not the only witness. Testimony from other witnesses indicated that AV's injuries were consistent with sexual abuse, that Hitt and Causey had engaged in activities consistent with the grooming

process, that Hitt had confessed to engaging in illicit sexual activity with AV both in Shreveport and in Mississippi, and that Hitt and Causey had engaged in sexual conduct with David Moore that was conducted in the same manner as with AV.

E. The district court's admission of expert testimony

This court reviews for abuse of discretion a decision to admit or exclude evidence. *United States v. Cantu,* 167 F.3d 198, 203 (5th Cir.1999). A decision to admit expert testimony is governed by the standards in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *See Moore v. Ashland Chem. Inc.,* 151 F.3d 269, 274 (5th Cir.1998) (en banc). Expert testimony is admissible "'if scientific, technical, or other specialized knowledge will assist the trier of fact.'" *Id.* at 274 n. 5 (quoting Fed. R. Evid. 702). The "'inference or assertion must be derived by the scientific method ... [and] supported by appropriate validation.'" *Id.* at 275 (quoting *Daubert,* 509 U.S. at 589-90, 113 S.Ct. 2786).

Hitt argues that the government's expert witness, Dr. Seiden, should not have been allowed to testify about the grooming process. Hitt argues that fact testimony was all that was needed to determine whether the actions of Hitt and Causey were genuinely charitable or were consistent with an illicit purpose. The government argues that Dr. Seiden's testimony regarding the methods by which sexual abusers of children typically operate is testimony regarding *modus operandi* and was properly admitted expert testimony.

This court has allowed, without discussion, the use of expert testimony to explain the behavior of those accused

of sexual offenses. *See, e.g., United States v. Byrd,* 31 F.3d 1329, 1338-39 (5th Cir.1994) (discussing experts' testimony that the behavior of the defendant indicated that he had "pedophilic motivation"). Moreover, as noted by the government, other circuits have allowed expert testimony that explains the *modus operandi* of sexual predators. *See United States v. Romero,* 189 F.3d 576, 585 (7th Cir.1999) (allowing expert testimony regarding the "modus operandi of modern child molesters"); *see also United States v. Hayward,* 359 F.3d 631, 636-37 (3d Cir.2004) (allowing expert testimony regarding the general patterns of behavior exhibited by child molesters). We hold that the admission of the testimony regarding typical behavior of child molesters was not an abuse of discretion.

Hitt also argues that there was not an adequate scientific basis for Dr. Seiden's testimony regarding sexual abuse victims returning to their abusers. Hitt, however, cites no authority for this proposition; instead, he argues that (1) Dr. Seiden referenced only two studies regarding return of victims to their abusers, (2) Dr. Seiden gave "no details" about the sample size in the first study, and (3) a defense expert criticized the second study as not excluding an alternative reason for the victims' behavior.

The government counters, arguing that Dr. Seiden relied on more than merely two studies and that even a defense expert conceded that return-to-the-abuser behavior can occur. Given that the district court is afforded deference in "gate-keeping" scientific evidence and that the application of *Daubert* should be flexible, we hold that the district court did not abuse its discretion by admitting expert testimony regarding return-to-the-abuser behavior. *See United States v. Rubio,* 321 F.3d 517, 525-26 (5th Cir.2003) (holding that the district court did not abuse its

discretion in allowing expert testimony despite extensive cross-examination on the validity of the scientific data).

F. Hitt's Rule 413 challenge

Review of a district court's decision to admit evidence is for abuse of discretion. *United States v. Coleman,* 997 F.2d 1101, 1104 (5th Cir.1993).

Rule 413(a) of the Federal Rules of Evidence provides:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Hitt contends that the district court erred by admitting testimony regarding a separate alleged victim, David Moore. Hitt argues that, since a Mann Act violation does not require proof that a sexual assault occurred, the testimony regarding Moore was irrelevant and prejudicial. Under Rule 413, however, evidence regarding the sexual abuse of Moore is admissible. Moore testified that the sexual abuse occurred in a certain way – Causey held Moore down while Hitt had anal intercourse with Moore – that is consistent with the manner that AV alleges. This *modus operandi* evidence is relevant to whether sexual activity occurred between the defendants and AV, which is relevant to whether the defendants had the requisite

intent to engage in illicit sexual activities across state lines.[12]

G. The use of Hitt's inculpatory statement against Causey

Since Causey's *in limine* motion preserved the issue, the district court's evidentiary decision on the *Bruton* issue is reviewed for abuse of discretion. *See United States v. Nutall,* 180 F.3d 182, 187-88 (5th Cir.1999). A non-testifying co-defendant's confession cannot be used to inculpate the defendant. *United States v. Walker,* 148 F.3d 518, 522 (5th Cir.1998), *abrogated on other grounds by Texas v. Cobb,* 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). Doing so when the co-defendant does not testify would deny the defendant his constitutional right to confront witnesses called against him and would result in a *Bruton* violation. *Id.* (citing *Bruton v. United States,* 391 U.S. 123, 127, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

Hitt's confession, of which Causey complains, occurred partially in a police squad car in transit from the site of arrest to the police station and partially in Detective Gammill's office at the police station. Gammill, who questioned Hitt both in the squad car and in his office, testified at trial as to the inculpatory statements allegedly made by Hitt in both places. Gammill testified that Hitt waived his *Miranda* rights and confessed to having anal

[12] To the extent that Hitt argues for exclusion under Rule 403, he includes only a conclusory assertion that the admission of the evidence was prejudicial. Hitt's conclusory assertion does not merit reversal. *See United States v. Parziale,* 947 F.2d 123, 129 (5th Cir.1991).

and oral sex with AV, both in Shreveport and in Mississippi.

Causey complains that a *Bruton* violation occurred when Gammill testified and the court did not provide a contemporaneous limiting instruction. If there was a *Bruton* violation, however, a limiting instruction would not have cured it. *United States v. Bell,* 367 F.3d 452, 469 (5th Cir.2004). And, as Causey's brief tacitly admits, Gammill's testimony, by itself, was not a *Bruton* violation since it in no way mentioned Causey. *See Bruton,* 391 U.S. at 127-28, 88 S.Ct. 1620 (noting that the offending statements implicated the co-defendant). Causey also alleges a *Bruton* violation in the use of Hitt's confession in (1) the cross-examination of Causey, (2) the cross-examination of one of Causey's witnesses, and (3) closing argument. The Sixth Amendment is not violated in these circumstances because Hitt's statement as elicited from Gammill on direct and, as used on cross-examination and in closing, did not include *any* references to Causey, and Causey had an opportunity to cross-examine Gammill. Therefore, the court is not faced with a situation where Causey cannot confront a witness brought against him. We reject Causey's *Bruton* challenge.

H. The limitation on witness questioning

A district court's limitation of cross-examination of a witness is reviewed for abuse of discretion. *See Davis,* 393 F.3d at 548. Abuse-of-discretion review applies only if the limitation did not curtail the defendant's Sixth Amendment right to confront witnesses. *See id.* Whether a defendant's Sixth Amendment rights were violated is reviewed de novo. *Wilkerson,* 233 F.3d at 890.

Dr. Zoog, who medically examined AV, was called by the government in its case-in-chief. Dr. Zoog was then recalled by Hitt as a defense witness. After Hitt's attorney concluded questioning, Causey declined to question Dr. Zoog. The government then cross-examined Dr. Zoog, and Hitt's attorney followed with a short re-direct. Causey's attorney then rose, presumably to ask Dr. Zoog questions, and the following exchange occurred:

> THE COURT: Mr. Kirksey [Causey's trial attorney], you rise?
>
> MR. KIRKSEY: Yes, Your Honor.
>
> THE COURT: On what basis? Do you get redirect when you didn't do your direct?
>
> MR. KIRKSEY: No, sir.
>
> THE COURT: Thank you. You may be seated.

Causey argues that he was denied his constitutional right to question Dr. Zoog on re-direct. His argument lacks merit. Dr. Zoog was not called as a witness against Causey when Causey alleges he was denied the opportunity to question. Thus, the Confrontation Clause was not invoked. *See Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (stating that the purpose of the Confrontation Clause is to ensure that defendants have the right to confront witnesses *against them*). Even under Confrontation Clause analysis, as the right to re-cross a witness is not a constitutional right under most circumstances, *see United States v. Morris,* 485 F.2d 1385, 1387 (5th Cir.1973), it follows that the right to re-direct is not a constitutional right in this circumstance. Because Causey declined to question Dr. Zoog on direct, it was not

a constitutional violation for the court to disallow Causey's attempt to re-direct, nor was it an abuse of discretion.

I. The government's closing statement

As Causey's trial counsel did not object to the government's comments in closing argument, the review is for plain error. *See United States v. Garza,* 608 F.2d 659, 665 (5th Cir.1979). "An appellate court may not correct an error the defendant failed to raise in the district court unless there is (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Mares,* 402 F.3d 511, 520 (5th Cir.2005) (internal quotation omitted). "If all three conditions are met an appellate court may then exercise its discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation omitted).

Improper argument warrants reversal when "taken as a whole in the context of the entire case, [it] prejudicially affect[ed] substantial rights of the defendant." *United States v. Corona,* 551 F.2d 1386, 1388 (5th Cir.1977). "In determining whether to reverse a defendant's conviction . . . , [this court] consider[s] three factors: (1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction." *United States v. Virgen-Moreno,* 265 F.3d 276, 290-91 (5th Cir.2001) (internal quotation omitted).

The objectionable argument occurred during the government's rebuttal, when the prosecutor referred to his cross-examination of Dr. Hindman, a colleague of Causey's

who, on direct, testified as to Causey's credibility. The prosecutor stated at closing:

> You [the jury] heard one of [Causey's] colleagues when I told them, look, [Causey] lied right there. And if I was mistaken, [Causey's counsel] would have jumped on me. Certainly Judge Hicks would have jumped on me. And even when I told [the colleague] [Causey] lied: It still don't [sic] change [the colleague's] opinion; [the colleague] think[s] Bill Causey tells the truth.

Causey contends that, while the government permissibly argued that Causey had perjured himself, the government improperly bolstered that argument by stating that, if Causey did not perjure himself, his counsel and the court would have corrected the prosecutor.

When a prosecutor uses personal knowledge to bolster an argument, this court has found the argument to be improper. *See Corona,* 551 F.2d at 1387-91 (reversing a conviction when the prosecutor, *inter alia,* personally vouched for the credibility of witnesses and argued at closing that he wished the jury's responsibility was his). *A fortiori,* the government's use of Causey's counsel's failure to object to a line of questions and the court's silence to bolster an argument that a defendant committed perjury was improper.

Nonetheless, the government's closing argument does not require reversal. The improper argument was an isolated statement in the government's lengthy closing; Causey admits as much. The prejudicial effect is less than it is in situations where the government repeatedly makes improper arguments. *See Garza,* 608 F.2d at 665 (indicating that any single improper statement "among those we

have isolated might not be enough to require reversal of the conviction and, indeed, some clearly would not"). Moreover, the district court orally cautioned the jury prior to opening statements that arguments of counsel and statements of the judge are not evidence to be used to convict the defendants; the court also included a written jury instruction of the same substance. Such instructions limit the prejudicial effect of the government's argument. *See Mares,* 402 F.3d at 516 (indicating that jury instructions that "attorneys' comments are not evidence" reduced the prejudicial effect of the statements). The jury instructions together with the isolated nature of the comment sufficiently cures any effect the prosecutor's isolated comment might have had. We reject Causey's argument that the government's improper argument warrants reversal.

III. CONCLUSION

Finding no merit in any of the defendants' arguments, we AFFIRM both Hitt's conviction and Causey's conviction.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30835

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

WILLIAM A CAUSEY

Defendant-Appellant

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

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ON PETITION FOR REHEARING EN BANC

(Opinion 12/13/06, 5 Cir., ___, ___ F.3d ___)

(Filed Jan. 22, 2007)

Before HIGGINBOTHAM, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Clement
United States Circuit Judge

REHG-6a